Medical Marijuana in the Workplace: Risks for Employers



By George Waggott and Jeremy Rankin (Student-at-Law), McMillan LLP

INTRODUCTION

As the use of medical marijuana continues to increase across Canada, employers will be encouraged to place a high priority on making changes to their workplace policies. With the passing of new *Medical Marihuana Access Regulations*, Canadians who require medical marijuana for a variety of health reasons will no longer need a licence from Health Canada to obtain it, and a simple doctor's prescription will do. As such, medical marijuana must be treated like any other prescription medication, and this may relax the traditional taboos associated with the drug.

Much like other medical drugs, a prescription for marijuana does not give the employee a green light to use it in the workplace. Both the employee and employer are subject to certain obligations with regards to the use of medical marijuana in the workplace. In order for both employers and employees to properly understand their rights and responsibilities, and to avoid unnecessary litigation, it is important to identify the various ways that the use of medical marijuana impacts the employer-employee relationship.

[learn_more caption="1. Accommodating Medical Marijuana under the *Ontario Human Rights Code* ' Vapourize the Stigma"]

Medical marijuana engages the same principles of accommodation as any other doctor prescribed drug. An employee's need to consume medical marijuana triggers an employer's statutory obligations. Section 5.1 of the Code mandates that an individual has the right to equal treatment with respect to their employment without discrimination on the grounds of 'disability'. Employees may be prescribed medical marijuana to cope with a number of conditions such as arthritis, cancer, chronic pain, or sleeping disorders.
The Code imposes a duty on employers to accommodate employees' disabilities to the point of 'undue hardship'. There are three different factors when determining whether or not the request for accommodation meets the threshold of undue hardship to the employer. First, the court looks to the cost of accommodation. Second, the court looks to whether or not there is any outside funding to help subsidize the costs of accommodation. Third, and perhaps most pertinent to medical marijuana, the court looks to any health and safety concerns the accommodation may pose. While second-hand smoke may pose a hazard to other employees, the employer would have to demonstrate that the individual could not be isolated, or that the issuance of a vaporizer would bring undue hardship to the employer. To date, no employer has been able to successfully establish undue hardship based on the health and safety risks posed by marijuana.

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[learn_more caption="2. Accommodating Medical Marijuana under the *Occupational Health & Safety Act*"]

The use of medical marijuana in the workplace is also governed by Ontario's *Occupational Health and Safety Act (OHSA)*. Under section 25 of the OHSA, employers have the duty to 'take every precaution reasonable in the circumstances for the protection

of a worker.’ Thus, employees do not have a right to be impaired in the workplace where their impairment may endanger their own safety or the safety of co-workers.
In order to appropriately gauge the employee’s capacity to continue to perform their job safely, the employer should request medical documentation from the employee that speaks to the ability to safely carry out assigned duties. If the inquiry discloses a meaningful impairment in the employee’s capacity to carry out their job, then the employer is not necessarily required to accommodate the employee’s request to use medical marijuana, particularly where the position involves the use of safety-sensitive equipment. Employees in safety-sensitive positions must inform their employers if they are going to be using medical marijuana.
The employer’s obligation to accommodate does not end when a meaningful impairment of the employee’s ability to perform their current job becomes apparent. The employer will likely be obligated to accommodate the employee in other ways such as allowing the employee a leave of absence while undergoing marijuana treatment, or providing the employee with alternative forms of work that do not engage safety concerns. Employers should be wary that termination of an employee, without first asking whether the medication the employee was taking was affecting job performance, will likely be found to be inappropriate. It is important for employers to understand that they have a broad obligation to investigate and make efforts to accommodate employees using prescription medications, including medical marijuana.

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[learn_more caption=”3. Creating Policy for Medical Marijuana in the Workplace ‘ A Joint Effort”]

Workplace policies dealing with medical marijuana should largely reflect policies created to address any other use of prescription medication in the workplace. However, it is important for employers to effectively and precisely

communicate the employee's entitlements and obligations with regards to using, or being under the influence of, medical marijuana. For instance, terms such as 'impairment' and 'under the influence' should be specifically defined so employees understand whether or not they fall under the scope of the policy. Employers should communicate what, if any, uses of medical marijuana will be considered acceptable in the workplace, and the appropriate procedure for reporting the use of medical marijuana. Employers should also address the disciplinary consequences of breaching the use or reporting protocols.

Engaging with employees at an early stage may work to reduce uncertainty and prevent future incidents or litigation. Employers would be wise to consult with their workplace health and safety committees in the development of policy regarding medical marijuana. Further, employers ought to consult with employees seeking accommodation when establishing the appropriate adjustments to the employee's work duties, schedule or work arrangements.

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[learn_more caption="4. Drug Testing"]

Despite developing clear and transparent policies regarding the use of medical marijuana in the workplace, employers often wish to subject employees to drug testing to ensure compliance. The restrictions on the employer's power to conduct these investigations, though, is worthy of exploration.

First, the onus lies on the employer to demonstrate reasonable cause to subject the employee to drug testing. The employer must be able to point to evidence sufficient to form a reasonable opinion that the employee is impaired. It is important for employers to note that the smell of marijuana, independent of any other indications that the employee is under the influence of marijuana, is not a reasonable basis for dismissal of the employee, even where the employee

occupies a safety sensitive-position. Evidence of a general problem with marijuana or other drug abuse in the workplace, for instance, may be sufficient to subject employees to random drug testing.
However, the employer is granted greater leeway in subjecting employees to drug testing in certain prescribed circumstances, alleviating them of the burden to establish reasonable cause. For instance, drug testing can be mandated after an incident, as a requirement of an agreed upon rehabilitation program, or as a precondition to employment, promotion or transfer.
Also, employers may not necessarily be allowed to draw adverse inferences from an employee's refusal to submit to a drug test. Drawing such inferences could amount to discriminating against the employee. However, where the employer had reasonable grounds for requesting the test, the drawing of an adverse inference will not likely be held to be discriminatory. Again, the onus lies on the employer to establish reasonable cause to test the employee, then shifts to the employee to refute that evidence by subjecting himself to a drug test.

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[learn_more caption="5. Reimbursement"]

Pursuant to the Ontario *Workplace Safety and Insurance Act*, employers may be responsible for reimbursing an injured employee for all or part of the cost of his/her medical marijuana treatment. For example, the employer will likely be obligated to reimburse the employee for an amount of marijuana that is 'necessary and sufficient' to the employee's treatment. The employer may also be obligated to cover the cost of the injured employee's vaporizer. Specific guidance should be sought on how these issues interact with the accommodation issues renewed earlier.

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CONCLUSION

While medical marijuana engages similar protocols for accommodation as any other prescription drug, employers would be wise to review their workplace policies to ensure they are complying with their obligations. Employers should also strive to effectively communicate the responsibilities of employees seeking to use medical marijuana.

Employers are encouraged to engage with employees and employee health and safety committees when deciding on accommodation plans and workplace policy addressing the appropriate use and disclosure protocols for medical marijuana. Consultation and effective communication with employees becomes particularly acute where employees are working in safety-sensitive positions. Employers are encouraged to fully understand their obligations with regards to accommodation, the appropriate circumstances for drug testing, and the degree of reimbursement they must provide employees who require medical marijuana.